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In the Supreme Court of the United States

OCTOBER TERM, 1975

MAURICE W. ROSENBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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Washington, D.C. 20530

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MEMORANDUM FOR THE UNITED STATES

After a jury trial in the United States District Court for the Central District of California, petitioner, a physician, was convicted on 27 counts of distributing a controlled substance, in violation of 21 U.S.C. 841(a)(1).[1] The court sentenced him to concurrent terms of

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[1] 21 U.S.C. 841(a)(1) provides in pertinent part:

> Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
>
> (1) to * * * distribute, or dispense * * * a controlled substance * * *.

Twelve of the 27 counts contained in the indictment charged petitioner with distributing dextroamphetamine, a Schedule II substance; nine counts charged distribution of secobarbital, a Schedule III substance; six counts charged distribution of meprobamate, a Schedule IV substance. See 21 U.S.C. 812.

imprisonment of two years on each count and fined him $20,000, but suspended imposition of sentence and payment of the fine pending appeal. The court of appeals affirmed (Pet. App. A 1-26).

The evidence against petitioner was based upon the testimony of five undercover narcotics agents who individually and repeatedly visited his office and obtained prescriptions from him. Their experiences were substantially identical and established the following mode of operation by petitioner.

When the agent arrived at petitioner's office pursuant to an appointment, the nurse recorded his or her name and address and collected the fee for an office visit, which was $15 cash for the first visit, and $8 for each subsequent visit. The nurse normally took the "patient's" record in to petitioner, with the cash clipped to one corner. Petitioner never gave the agent a physical examination (Tr. 184, 194, 234), and the agent never voluntarily indicated that he had any medical problem (*e.g.*, Tr. 233, 356).

For example, when petitioner asked Agent Van Diest what was wrong with her, she said that she did not have any problems, that she had been buying pills on the street and wanted a safer source, and that she had heard that she could get pills from petitioner. Agent Van Diest told petitioner that she wanted some "reds."[2] When petitioner asked why she wanted them, she replied that she just liked taking them. Petitioner indicated that he would give her only a month's supply and that the pills could be dangerous.

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[2]A street name for seconal.

When petitioner asked Agent Van Diest whether he could do anything else for her, she told him that she would also like some "whites."[3] Petitioner asked her if she would like to say that she wanted to lose weight, and she answered that she did not really care. Petitioner replied: "Well, we'll say that you would like to lose weight." Petitioner gave Agent Van Diest prescriptions for both seconal and dexedrine (Tr. 176-185).

The testimony of the other agents was similar (*e.g.*, Tr. 233-235, 350-352). In addition, the agents testified that when they paid their money but did not receive prescriptions, petitioner refunded their money (Tr. 191), and that they had informed petitioner that they were giving some of the prescribed pills to other persons (Tr. 323) and were also obtaining pills from other doctors.

1. Petitioner's contention that physicians registered under the Controlled Substances Act are exempt from prosecution under 21 U.S.C. 841 is the issue presently before this Court in *United States* v. *Moore*, No. 74-759, certiorari granted, 420 U.S. 923. Accordingly, we suggest that the instant petition be held pending decision in *Moore*.[4]

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[3] A street name for dexedrine, a drug that can be used for weight reduction purposes.

[4]We are sending a copy of our brief in *Moore* to petitioner's counsel.

Petitioner's remaining contentions are without merit.

2. Petitioner argues that even if 21 U.S.C. 841 is applicable to registrants, a physician (or other "practitioner") may be indicted for unlawful "dispensing" but not unlawful "distributing." Under the Controlled Substances Act, however, "dispense" means "to deliver a controlled substance to an ultimate user * * * by, or pursuant to the *lawful* order of, a practitioner * * *" (21 U.S.C. 802(10); emphasis supplied). In addition, a "practitioner" is defined as "* * * a physician * * * licensed, registered, or otherwise permitted * * * [to] dispense * * * *in the course of professional practice* * * *" (21 U.S.C. 802(20); emphasis supplied).

Under the Act, dispensing is a lawful act when done pursuant to a lawful order of a practitioner "in the course of professional practice." A physician who prescribes or administers drugs other than for a professional purpose is properly charged with unlawful "distributing," —that is, delivery "other than by administering or dispensing" (21 U.S.C. 802(11)). Thus, as two courts of appeals have held, petitioner was correctly charged with unlawful distribution. See *United States* v. *Badia*, 490 F.2d 296, 298 and n. 4 (C.A. 1); *United States* v. *Black*, 512 F.2d 864, 866 (C.A. 9).

Petitioner's claim (Pet. 10-11, 15) that this analysis renders the use of the term "dispense" in Section 841 (a)(1) superfluous was adequately answered by the First Circuit in *Badia* (490 F.2d at 298, n. 4):

> We think the reason Congress included the term "dispense" in §841(a)(1) was to compel physicians to become properly licensed. If not licensed, a physician could then be convicted of unlawful dispensing. However, once licensed, he could not be convicted of unlawful dispensing because * * * the

statute defines the term in and of itself as a lawful act.[5]

3. Petitioner further contends that the phrase "in the course of professional practice" (21 U.S.C. 802(20)) is unconstitutionally vague as a standard by which to gauge the legality of a practitioner's conduct. As the court of appeals stated, however, this claim is but "another statement of * * * [the] contention that Congress did not intend that doctors registered under [the Controlled Substances Act] * * * should be punished under section 841" (Pet. App. A 4). For if —as we contend in *Moore*—Congress intended the Controlled Substances Act to confer no immunity upon registrants that they did not possess under the Harrison Narcotics Act, the predecessor statute, then the presence of virtually the same language in the Harrison Act and the ease with which this Court and the circuits have interpreted it are dispositive of petitioner's claim.[6] As

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[5]The First Circuit in *Badia* went on to observe that while this view was apparently in conflict with the position taken by the Fifth Circuit in *United States* v. *Leigh*, 487 F.2d 206—also relied upon by petitioner—*Leigh* itself was in seeming conflict with the prior Fifth Circuit decision in *United States* v. *Collier*, 478 F.2d 268, in which the court affirmed a physician's plea of guilty to unlawfully "distributing" controlled substances under 21 U.S.C. 841(a)(1).

[6]Under the Harrison Act, all persons who sold or prescribed certain narcotic drugs were required to register with the Secretary of the Treasury (26 U.S.C. (1964 ed.) 4722), and were prohibited from selling or prescribing drugs except to persons with order forms issued by the Secretary, 26 U.S.C. (1964 ed.) 4705. The latter requirement was inapplicable, however, "[t]o the dispensing or distribution of narcotic drugs to a patient by a physician * * * or other practitioner registered under section 4722, *in the course of his professional practice only* * * *." 26 U.S.C. (1964 ed.) 4705(c)(1) (emphasis supplied). See also 26 U.S.C. (1964 ed.) 4742(b)(1) (the Marihuana Tax Act), and 21 U.S.C. (1964 ed., Supp. V) 360a(a) and (b) (Drug Abuse Control Amendments of 1965).

the court of appeals observed in the instant case: "This language has been in the statute books since 1914 and no one has ever had problems with its interpretation" (Pet. App. A 11).

For example, in *United States* v. *Behrman*, 258 U.S. 280, 287, this Court stated that "the purpose of the [Harrison Act practitioner] exception is to confine the distribution of these drugs to the regular and lawful course of professional practice * * *." In *Boyd* v. *United States*, 271 U.S. 104, 106, the Court said that the issue was whether a defendant-doctor "issued the prescriptions in good faith * * * in the course of his professional practice * * *,'" and in *Linder* v. *United States*, 268 U.S. 5, 18, the Court defined the outer bounds of what constitutes bona fide medical practice, stating that "[m]ere pretense of such practice, of course, cannot legalize forbidden sales * * *." As the Court said in *Jin Fuey Moy* v. *United States*, 254 U.S. 189, 194:

> Manifestly the phrases "to a patient" and "in the course of his professional practice only" are intended to confine the immunity of a registered physician, in dispensing the narcotic drugs mentioned in the act, strictly within the appropriate bounds of a physician's professional practice, and not to extend it to include a sale to a dealer or a distribution intended to cater to the appetite or satisfy the craving of one addicted to the use of the drug. A "prescription" issued for either of the latter purposes protects neither the physician who issues it nor the dealer who knowingly accepts and fills it.[7]

[7]See also *United States* v. *Warren*, 453 F.2d 738 (C.A. 2), certiorari denied, 406 U.S. 944; *White* v. *United States*, 399 F. 2d 813 (C.A. 8).

The statutory phrase "in the course of professional practice," as construed by this Court under the virtually identical language of the Harrison Act, gave petitioner fair notice that his conduct here was proscribed by Section 841(a)(1). See *Rabe* v. *Washington*, 405 U.S. 313, 315. Whatever vagueness might inhere in the phrase as applied to marginal cases, petitioner's conduct—involving the repeated prescription of drugs on demand to complete strangers with at most the "mere pretense" of medical justification—was squarely within the scope of the statutory standard. He cannot avoid the application of the statute to conduct that the Act clearly covers by the claim that the statute is unconstitutionally vague as applied to others. See *Parker* v. *Levy*, 417 U.S. 733, 756.[8]

[8]The dissenting judge in the court of appeals (Pet. App. A 23) pointed to the unexplained omission from the present statute of the former qualifying word "only" from the phrase "in the course of professional practice." That omission does not render vague what was formerly a clear and comprehensible standard. Congress presumably omitted the word because it was redundant, the exception for authorized dispensing under the Harrison Act being sufficiently circumscribed by the phrase "in the course of professional practice."

Nor is the omission from the Controlled Substances Act of the prior statutory language, "the dispensing or distribution * * * to a patient," significant. Indeed, Congress had already omitted the phrase "to a patient" from the exception for authorized dispensing by practitioners created by the Drug Abuse Control Amendments of 1965 (see 21 U.S.C. (1964 ed., Supp. V) 360a(a) and (b)). The omission of the phrase simply reflects the fact that, under the Controlled Substances Act, one may properly dispense to a person other than a "patient" (*e.g.*, a "research subject" (21 U.S.C. 802(10))).

4. Finally, petitioner contends (Pet. 20) that the phrase "for a legitimate medical purpose" contained in 21 C.F.R. 306.04(a) (1973 ed.)[9] impermissibly expands the range of conduct encompassed by the statutory standard, "in the course of professional practice." However, the regulation does not super-impose a new criterion upon the statutory standard, or make punishable conduct which the statute itself does not proscribe; it merely restates and explicates that which is contained in the statute. See also *United States* v. *Green*, 511 F.2d 1062, 1069-1070 (C.A. 7), pending on petition for certiorari, No. 74-1233.

Moreover, the difference in phraseology upon which petitioner relies is irrelevant on the facts of this case. As the court of appeals noted, the trial judge's charge to the jury "laid out the issue as whether the doctor had acted not in the course of professional practice, which is the statutory language" (Pet. App. A 10-11), and the judge "in no way indicated that the jury could find [petitioner] guilty if it found that he *either* acted not in the course of his professional practice *or* not for legitimate medical reasons" (*id.* at A 10; emphasis supplied).

The petition for a writ of certiorari should be held pending this Court's decision in *United States* v. *Moore* and then disposed of in accordance with that decision.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JULY 1975.

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[9]21 C.F.R. 306.04(a) (now 21 C.F.R. 1306.04(a)) provides in pertinent part:

> A prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.